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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 526.

THE BALTIMORE & OHIO RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY,
Petitioners,

v.

A. SPATES BRADY, *Respondent.*

PETITION FOR REHEARING

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Counsel for Respondent.

THE J. W. STOWELL PRINTING COMPANY, FREDERICKSBURG, MD.

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THE BALTIMORE & OHIO RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY,
Petitioners,

v.

A. SPATES BRADY, *Respondent.*

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

PETITION FOR REHEARING

The respondent in the above entitled proceeding respectfully petitions the Court to grant a rehearing therein on the following grounds—

I.

The ultimate conclusion of the Court that respondent is "bound by the award" of the Commission is based upon subsidiary conclusions going back to and squarely resting upon inadequate statements of fact disclosing a misapprehension by the Court as to the real character of the primary question presented to the Commission.

1. The conclusion of the Court that respondent is "bound by the award" is predicated upon its conclusion that respondent, "having elected to seek relief through the Commission, is not entitled to recover more than the amount of the award." The conclusion that respondent "elected to seek relief through the Commission" is in turn based upon the conclusion of the Court that "there was no question in this case requiring the exercise of the Commission's administrative powers." And the conclusion that "there was no question in this case requiring the exercise of the Commission's administrative powers" is in turn based upon and goes back to statements of the Court that respondent—

> "*operated a coal mine on a branch of the Baltimore & Ohio railroad over which the Western Maryland had trackage rights. His mine was located between two mines operated by a competitor and served by both defendants*" —

and hence that his mine "was in the same class as the mines of its (his) competitor", and "entitled to have a supply of cars from either or both defendants as it (he) saw fit."

2. The italicised findings do not fully disclose the character and difficulty of the question presented to the Commission. Both the contract and the Western Maryland tariffs *specifically* named the competitor's mines, but not respondent's mine (R 2-3, 11-12). Respondent's mine was not on the main tracks of the branch, but on a short spur leading off the branch in the same town as one of the competitor's mines and connecting with the branch at a point between two of the competitor's mines (R 10-11). In a case decided prior to the period of the case (*Ridge Coal Mining Co. v. M. P. R. R. Co.*, 62 I. C. C. 259, 262), the Commission laid down the rule or principle that "if a carrier extends its service by a trackage agreement to one mine on another line, it would be difficult, if not impossible, to justify a re-

fusal to accord similar treatment to another *intermediate competing mine located on the track over which it operated under the trackage agreement*" (R 13). The Commission also had a rule pertaining to the application of rates from or to "intermediate" points not specifically named in tariffs (R 19, also 102 I. C. C. 19, 25). Respondent contended that his mine was "intermediate" to two of the competitor's mines within the meaning of the contract, tariffs and the Commission's rulings on the subject, and hence entitled to be regarded as "on" the Western Maryland (R 13). Petitioners contended to the contrary (R 14, 16, 19, also 102 I. C. C. 19, 25). The Commission held that respondent's mine was "intermediate" to the competitor's mines on the Coalton Branch and competitive with all of them, and that petitioner's acts and practices whereby they accorded Western Maryland service to the competitor's mines while failing to accord similar service to respondent's mine was unlawful (R 19, 11).

In the case so far stated, it is clear that a preliminary question which the Commission had to determine was whether respondent's mine was "on" the Western Maryland. The answer depended upon the solution of another preliminary question, to wit, whether respondent's mine was "intermediate" to any of the competitor's mines covered by the trackage contract and Western Maryland tariffs, all of which (both contract and tariffs) the statute required to be filed with the Commission. *Section* 6 (1-4) and 6 (5). The Commission noted that respondent's mine was on a spur "less than .05 mile" from the physical connection with the branch, a location which that body of experts "appointed by law and informed by experience" in such matters regarded as sufficiently close to the branch to be "on" it and hence "intermediate" to the competitor's mines at the end of the branch (R 11). The Commission's answer might

have been different if the distance from the mine to the physical connection had been 5 miles instead of .05 mile, or the spur on which the mine was located sufficiently long that it was not a "spur" but another "branch".

The foregoing preliminary question was not "a pure question of law" completely cognizable in a court. It was a question of law with administrative aspects, a mixed question of law and fact, and hence within the category of questions which called for "the exercise of the regulating function of the Commission". It was somewhat similar to that presented and decided in *Texas & P. R. Co. v. American Tie & T. Co.*, 234 U. S. 138, 146 as follows—

> "It is not disputable that the pivotal question in the case was whether oak railway cross-ties were included in the filed tariff fixing a through lumber rate of 24 cents per hundred weight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business, as developed in the testimony, it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy, and upon which its decision, therefore, depends.
>
> There is no room for controversy that the law required a tariff, and therefore, if there was no tariff on cross-ties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute."

and to that presented and decided in *Standard Oil Co. v. United States*, 283 U. S. 235, 238-9, in this wise—

"The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use."

and to one described in *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 292, as follows—

"But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law,—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed."

The larger preliminary problem which the Commission necessarily had to solve was somewhat similar to one presented in *Adams v. Mills*, 286 U. S. 397, 409-10, where it was said—

"The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice. The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transpor-

> tation. That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so. Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs.

and to one decided in *Interstate Com. Com. v. Atchison, T. & S. F. R. Co. (Los Angeles Switching Case)*, 234 U. S. 294, 311, as follows—

> "* * * it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service, which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.
>
> Such a question is manifestly one upon which it is the province of the Commission to pass.

A leading case involving a trackage contract somewhat similar to the one involved here was *York Mfrs. Asso. v. P. R. Co.*, 73 I. C. C. 40, 50, 51-2. There a majority of the Commission held that the practice of the Pennsylvania and Western Maryland in extending the use of their tracks to each other in a certain limited "zone" at York, Pa., and not in a neighboring zone was unduly preferential of shippers in the favored zone and unduly prejudicial to shippers outside that zone. A divided statutory court enjoined the Commission's order, holding that "the industries located along the tracks of either company in the zone are in law to be considered as on the individual tracks of both companies and the industries beyond this zone as located on the tracks of one of the companies only." *Pennsylvania R. Co. v. United States*, 295 Fed. 523, 527. This Court reversed the judgment of the statutory court, treated the question as administrative in character, and held—

"There is nothing in the Act to regulate Commerce, as originally enacted, or in Transportation Act, 1920, or in any earlier amendment, which indicates a purpose on the part of Congress either to allow a carrier to create undue prejudice by the use of facilities possessed, or to narrow the Commission's power to prevent unjust discrimination."

Subsequently, the Pennsylvania attempted to comply with the Commission's order by cancelling the arrangement within the zone, but was prevented from doing so by the Commission. 107 I. C. C. 219, 231, 241-4.

But even if it be assumed, as the Court assumed, that the preliminary question whether respondent's mine was "intermediate" to mines covered by the trackage contract and Western Maryland tariffs and therefore "on" the Western Maryland was "a pure question of law" requiring no administrative assistance of the Commission for its determination, the character of the problem presented to the Commission is not completely solved. The trackage contract and Western Maryland tariffs were initiated sometime prior to October 14, 1922, i.e., during a period of car *surplus*. The period from October 14, 1922 to April 1, 1923, the period of the case, was one of acute car *shortage*. During this period, respondent sold his coal entirely on the commercial market; the competitor had a large locomotive fuel contract with the Western Maryland which had to be filled partly with coal produced at its mines on the Coalton Branch (R 17, 12). Respondent's business was such that he did not know from one day to the next where his coal was going; the competitor's business was largely contracts divided about 80 per-cent on the Western Maryland and 20 per-cent on the B. & O. (R 17, 15-17).

In its last analysis, the question which the Commission was called upon to determine concerned the distribution of coal cars to mines located on a jointly-operated branch dur-

ing a period of car shortage, and was this: was the carriers' practice in according both Western Maryland and B. & O. car service to the competitors mines which had a Western Maryland fuel contract and divided their shipments between the two carriers according to definite percentages, while restricting respondent's mine to B. & O. car service because he had no Western Maryland fuel contract and declined to divide his shipments between the two carriers according to any definite percentages, unlawful? The carriers insisted that the classification and treatment accorded the competitor's mines was not that applicable to a "joint" mine under the car-distribution rules because the competitor divided its shipments according to definite percentages, whereas the rules permitted a "joint" mine operator to divide them as he saw fit. Respondent insisted that his mine was entitled to the classification and treatment of a "joint" mine and permitted to divide its orders and shipments between the two carriers as he saw fit. The Commission so held.

In the circumstances of the case, whether the carriers' "acts and practices" were such as to entitle respondent's mine to the full-fledged rating, classification and treatment of a "joint" mine during a period of acute car shortage was not "a pure question of law." It was essentially administrative in character. It was clearly one with administrative elements and hence within the limits of the Commission's exclusive initial jurisdiction.

The question thus presented has common elements with that presented and decided in *Midland Valley R. Co. v. Barkley*, 276 U. S. 481, 483. There the facts, contentions of the parties, and the conclusions of the Court were as follows—

> "Barkley and Burnett operated a wagon coal mine in Arkansas located about a quarter of a mile from

the line of the Midland Valley Railroad, a corporation of that state. They shipped their coal by that carrier, largely in interstate commerce. In the spring and summer of 1922 there was a widespread strike in bituminous coal mines throughout the United States. When mining was resumed in August, an acute car shortage developed. Coal is usually shipped in open top cars; and tipple mines, which are the largest producers of coal, can use only cars of that type. The supply of these being inadequate, the Midland, like other carriers, distributed the available open top cars among the tipple mines and its box cars among the wagon mines. Barkley and Burnett refused to accept box cars; and later brought, in an Arkansas court, this action against the Midland to recover damages for the alleged failure to furnish, during the period of the car shortage, an adequate supply of cars. By appropriate proceedings, the defendant objected to the maintainance of the action in the state court. It contended that the proper distribution of coal cars by interstate carriers in time of car shortage was an administrative question which Congress had committed to the Interstate Commerce Commission; and that the plaintiffs should have sought relief by application to that board. The trial court overruled the objection; the plaintiffs got a verdict; the judgment entered thereon was affirmed by the highest court of the state; * * and this court granted a writ of certiorari. * *. The only question for decision is whether the action lies.

The plaintiffs contend, and the state court held, that the action lay because it was brought to enforce the common-law duty of the carrier to furnish cars, * * —a duty confirmed by the statute of the state * * , and recognized by the Interstate Commerce Act. They argue * * that the plaintiffs made no attack, open or covert, upon any regulation or order of the Commission relating to the supply or distribution of cars * * that consequently no administrative question was involved * * .

> The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was no order of the Commission which required the Midland to distribute all available open top cars among the tipple mines. But the reasonableness of the Midland's practice in doing so, and in allotting box cars to the wagon mines, was the substantial matter in controversy. The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demand which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers. * * In the case at bar, the right of the plaintiffs to recover depended upon whether the defendant's practice of distributing its open top cars to tipple mines and its box cars to wagon mines was reasonable. * * It was clearly one of those questions which, as recognized in the Puritan case, calls for "the exercise of the regulating function of the Commission". * *
>
> In the case at bar, the adequacy of the carrier's supply of open cars in normal times was not seriously questioned; there was no suggestion that the plaintiff's mine had been discriminated against; and the only substantial complaint was that the Midland's practice in allotting the open top cars to the tipple mines was illegal. * *
>
> We have no occasion to consider whether the then existing orders of the Commission required the Midland to adopt the practice followed. * *

In the sense that they all tendered the same commodity for transportation at points on the Midland Valley, the wagon mine and the tipple mines were in the same "class" and "on" the same railroad, their only distinguishing characteristic being in the means employed to load the coal into cars, a non-*transportation* difference. And the Midland Valley's practice of restricting wagon mines to box

cars and allotting to the tipple mines the more desirable open top cars was covered by no published rule of the railroad or regulation of the Commission. It is difficult to see how that *practice* presented any more elements of an administrative question than did the petitioners' *practice* of restricting respondent's mine to B. & O. cars and allotting both B. & O. and Western Maryland cars to the competitor's mines.

In *Director General v. Viscose,* 254 U. S. 498, 503-4, a shipper of silk secured an injunction restraining the Director General of Railroads from excluding silk from the list of commodities transported by railroads as freight. The complainant shipper of silk and the shippers of other commodities were in the same "class", in the sense that they were all entitled to transportation by railroad upon tender of goods for transportation by such an agency. The complainant shipper of silk therefore contended in this Court that "there was no administrative question" and that the "thing presents a question of law for the courts". But this Court (by a vote of 5 to 4) held that "exclusion in this case was an *attempted* classification * * within the exclusive initial jurisdiction of the Commission". It is impossible to see how that "*attempted* classification" presented an administrative question, if petitioners' actual classification (in practice and car service) of respondent's mine as a local B. & O. mine and the competitor's mines as "joint" B. & O. and Western Maryland mines presented no elements whatsoever of an administrative question. The railroads' refusal to furnish transportation to the shipper of silk and petitioner's refusal to furnish Western Maryland car service to respondent's mine are clearly in the same category. There is no logical basis for drawing a line between them, and treating the first as presenting an administrative question within the exclusive initial jurisdiction of the Com-

mission and the second as presenting "a pure question of law" within the concurrent jurisdiction of the Courts.

Moreover, in its per curiam opinion in the equity proceeding instituted by respondent, this Honorable Court clearly indicated that it then regarded the question involved here as administrative in character. *Brady v. United States*, 283 U. S. 804. In affirming the decree of the special court, this Court cited five cases. *Standard Oil Co. v. United States*, 283 U. S. 235; *United States v. L. & N. R. Co.*, 235 U. S. 314, 320 (note reference to p. 320); *Interstate Com. Com. v. D. L. & W. R. Co.*, 220 U. S. 235, 251 (note reference to p. 251); *Interstate Com. Com. v. Illinois C. R. Co.*, 215 U. S. 452, 470 (note reference to p. 470); *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 494 (note reference to p. 494). All five cases involved questions which this Court deemed administrative and committed to the exclusive initial jurisdiction of the Commission. *The Court's references to particular pages of the opinions cited in the last four cases are to parts of the opinions dealing exclusively and entirely with the principle that the administrative functions of the Commission are not reviewable by the courts, thus strongly indicating that this Court then deemed the question decided by the Commission in the instant case as one within the administrative category. It is difficult to account for the Court's reference to the particular pages unless it so regarded the question.*

3. If the question presented in the instant case is administrative, respondent was required to secure the Commission's determination of the standard upon which his recovery depended before he could assert any right to damages *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 469; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 131. He did secure the Commission's determination of that standard, but by the time the Commission announced its decision, it was too late to institute a Section 9 action

at law in the District Court (R 96). The Commission's determination of the administrative question was not made until May 10, 1926 (R 9), or more than two years after the cause of action accrued, consequently respondent was compelled to carry on before the Commission. Section 16 (3b) of the Act; *A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 667. Respondent did not make a voluntary election of remedies as contemplated by Section 9; he was deprived of this right by the delay of the Commission.

Viewed from the foregoing standpoint, the conclusions of the Court that respondent "*elected* to seek relief through the Commission" and *elected* "to call on the Commission for the determination of his damages" are inaccurate. He made no such election. He was compelled by the Commission's delay to proceed for damages before that body or not at all. A construction of Section 16 (2) that in such a case the injured shipper is "bound by the award" of the Commission would be palpably unjust. In *Knowlton v. Moore*, 178 U. S. 42, 77, this Court said that it is—

> "bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Indeed, the Court holds in its opinion herein that—

> "The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him,"

thus indicating that if the "right of election" is denied to a claimant by the Commission's delay in deciding the administrative question, there would be no "adequate ground for making the Commission's award final as to him."

II.

The conclusion of the Court that the Section 16 (2) suit is "for the enforcement of the award" is inaccurate in a case where, as respondent contends was the case here, the award must be predicated upon an administrative standard previously determined by the Commission.

1. In support of its conclusion that the Section 16 (2) suit is for the "enforcement of the *award*", the Court cites Section 16 (3f) of the Act and *Lewis, etc. Co. v. Southern Pacific Co.*, 283 U. S. 654, 661.

Section 16 (3f) is that "a petition for the enforcement of an *order* for the payment of money shall be filed *** within one year from the date of the order, *and not after.*" In cases involving administrative questions, the *order* includes the administrative *finding* and *standard* as well as the *award*. It did in the instant case (R 29-30). The administrative finding and standard were *conclusive*, while the award was merely *prima facie* correct. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 257-8. Respondent's suit was not for the enforcement of the *award*, but for the enforcement of the Commission's administrative *standard*.

Moreover, the fact that the section requires the petition to be filed "within one year from the date of the order, *and not after*" shows that it was intended merely to limit the time within which the petition referred to must be filed, and not the scope of the suit.

And in *Lewis, etc. Co. v. Southern Pacific Co., supra*, this Court, after stating that the Commission's determination of the administrative question is a "condition precedent to suit", observed that Section 16 (2) "contains nothing relating to evidence and procedure in state courts," and further that "*it is clear that the action is not on the award as such.*"

In cases requiring the Commission's determination of the administrative question, "it is clear that the action is not on the award as such," *but on and for the enforcement of the Commission's administrative standard, the only conclusive part of the order.*

The Court further observes that "plaintiff may not adopt the *award* as the basis of his suit and then attack it", citing *Mitchell Coal Co. v. Penna. R. Co.*, 230 U. S. 247, 258. Respondent did not adopt the *award* as the basis of his suit; he adopted the Commission's administrative *finding* and *standard* as the basis for his action. And the case cited, at the particular page referred to, holds that "the plaintiff cannot claim *under the Act* against it." Respondent here is claiming under the Act, i.e., under the finding and standard fixed by the Commission pursuant to the Act.

2. If the instant case is viewed as one involving an administrative question, the Court's conclusion that respondent is "bound by the award" of the Commission is counter to its holdings in *L. & N.R.R.Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291, that "whatever the damages were, they could be recovered," and in *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 469, that "the finding of the Commission as to the amount of damages" has only the effect "prescribed in Section 16 of the Act," i.e., the effect of prima facie evidence. These two cases also involved administrative questions.

III.

If the foregoing contentions are found to be without merit, the Court is respectfully requested to amend its order herein so that the District Court may enter final judgment against the defendants for the amount of the Commission's award together with interest, costs and a reasonable attorney's fee, without the necessity of a new trial.

1. The first sentence of the second paragraph and the concluding sentences of the Court's opinion herein read as follows—

> "There is no bill of exceptions, and we are called on to decide whether the facts alleged in the complaint, of which the reports and order of the Commission are a part are sufficient to sustain the judgment.
>
> * * * * * * *
>
> "The allegations of the complaint comply with the requirements of Section 16 (2) and are clearly sufficient to sustain a judgment against the defendants for the amount of the award together with interest, costs and a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.
>
> The judgment of the Circuit Court of Appeals is reversed. The case is remanded to the District Court for proceedings in accordance with this opinion."

The judgment was for $63,048.60 with interest not including attorney's fee; the award was for $12,838.31 with interest.

2. In view of the nature of the case, the prima facie effect of the Commission's order and the action of petitioners in not filing a bill of exceptions, thereby waiving, in effect, all questions except the one of law as to whether respondent is entitled to recover more than the Commission's award together with interest, costs and a reasonable attorney's fee, it is respectfully submitted that this Court would be justified in carrying out the policy of the law to end litigation by remanding the case to the District Court with instructions to enter final judgment as above requested.

In *Adams v. Mills,* 286 U. S. 397, 406, 417, suit was brought in a District Court on a reparation order for $140,001.25 with interest. The case was tried before a jury upon

the evidence presented to the Commission and additional evidence introduced by the parties at the trial. At the close of the evidence, each of the two defendants moved on numerous grounds for a directed verdict. The District Court granted the motions on the ground that the plaintiffs had no such interest in the claims as entitled them to sue under Section 8 and 16 (2) of the Act. The Circuit Court of Appeals affirmed, but not being entirely satisfied with the reason assigned by the District Court, rested its decision on another ground. This Court granted certiorari, considered the propositions of law presented by the record, reversed the judgment of the Circuit Court of Appeals, *and remanded the case to the District Court with instructions to enter judgment for the amount of the reparation awarded together with interest and a reasonable attorney's fee to be fixed by it.*

The record of the case in this Court discloses that the respondents filed petitions for rehearing on the ground, among others, that if the judgment was to be reversed they were entitled to a new trial. The record of the case also shows that the pleadings presented material issues of fact, that the respondents in moving for a directed verdict expressly reserved the right to submit the case to the jury if the motions were overruled, and that the petitioners made no motion for a directed verdict. This court denied the petitions and declined to remand the case for a new trial.

There, the action of the respondents in moving for a directed verdict was tantamount to an admission on their part that in view of the nature of the proceeding and the effect of the Commission's order the case was one for the determination of the Court. Here, the action of petitioners in not filing a bill of exceptions had the effect of eliminating all questions of fact and of putting petitioners in a position

where they are estopped from objecting to the judgment to the extent that it is supported by the complaint including the reports and order of the Commission made parts thereof. This Court holds in the opinion on file that the complaint complies with the requirements of the statute and is "*clearly* sufficient to sustain a judgment against the defendants for the amount of the award together with interest, costs and a reasonable attorney's fee." It also holds that a Section 16 (2) suit is one to *enforce* the Commission's award. It would seem to follow that if the judgment herein had been for the amount found supported and sustained by the complaint, this Court would have affirmed it.

In the cited case, there was room for the exercise of the Court's discretion to end the litigation by authorizing the entry of final judgment, notwithstanding the Seventh Amendment, the provision of the statute that the Section 16 (2) "suit shall proceed in all respects like other civil suits for damages", and the decision in the *Meeker Case*, 236 U. S. 412, 430, that the prima facie character of a reparation order "does not abridge the right of trial by jury or take away any of its incidents". Likewise here, the state of the record is such that the Court would be justified in ending the case by authorizing the entry of final judgment for so much of the present one as is permitted by the statute. The cited case was 13 years old when the Court declined to remand it for a new trial; the instant case is now over 10 years old.

Wherefore, it is respectfully urged that this petition for rehearing be granted and that the judgment below be, upon further consideration, affirmed but if this request is denied, then it is urged that the order herein be amended so that the District Court may enter final judgment against the defendants for the amount of the Commission's award together

with interest, costs and a reasonable attorney's fee to be fixed by it.

Respectfully submitted,

GEORGE T. BELL,
SAMUEL T. SPEARS,
Counsel for Respondent.

CERTIFICATE OF COUNSEL

I, George T. Bell, one of the counsel for A. Spates Brady, respondent herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

GEORGE T. BELL.